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No. 95-424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURF LAWNMOWER REPAIR, INC. and
JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN,
MARY ANNE DEMARCO, DAVID HALL
and BYRON CAMPBELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

PETITIONERS' REPLY BRIEF

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PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners Turf Lawnmower Repair, Inc. ("Turf") and John L. Gloria ("Mr. Gloria") (collectively "Petitioners") submit this brief in reply to Respondents' brief in opposition to the Petition for Certiorari.

PETITIONERS' REPLY TO THE COUNTERSTATEMENT OF THE MATTER INVOLVED

Respondents' opposition brief, unfortunately, spends more time inventing procedural barriers to this Petition going forward rather than addressing the substance of the Petition or the merits of the arguments advanced in its support. In the opinion below, the New Jersey Supreme Court, with a holding uninvited by Respondents' briefs or arguments, granted the Respondents the benefit of the actual malice standard in this defamation action:

> We examine the article in its entirety assuming that all of its allegations are true. If, drawing all reasonable and normal inferences, the article reads fairly and describes conduct, activities, and events that would lead an average reader to conclude that the owner engaged in business practices that were unconscionable, deceptive, misleading, and reflected bad faith, then the actual malice standard would be applicable.

(33a).

Petitioners argued in their Petition that the effect of this holding, accepting at face value all allegations contained in the article for the purposes of resolving whether Respondents created the basis for an actual malice defense, arbitrarily and capriciously granted to Respondents the right to create their own defamation defense, in violation of this Court's decisions in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979). Respondents apparently have no meaningful response to this argument, hastily treating *Hutchinson* and *Wolston*, cases at the heart of the

Petition, in a brief footnote (Rb14) that trivializes the constitutional issues raised by the New Jersey Supreme Court's decision. Without belaboring the point, by accepting the veracity of all of Respondents' allegations, the New Jersey Supreme Court permitted the Respondents to create their own defense simply because of the sensational nature of the allegations they chose to include in their article. As this Court stated in *Hutchinson*, "[c]learly those charged with defamation cannot, by their conduct, create their own defense by making the claimant a public figure."

Equally absent is Respondents' response to Petitioners' argument that their proofs are more than sufficient to satisfy an actual malice standard under the standards announced by this Court. Respondents simply argue that this Court should pay no heed to the misapplication of constitutional principles by the courts below since, Respondents assert, this Court's time and resources are better spent on other matters. Most telling, Respondents provide this Court with no citations from the factual record to contradict the evidence of actual malice cited by Petitioners. Like the courts below, they state no basis to believe their defense that they acted without knowledge of the falsity of their allegations.

In place of substance, Respondents contrive jurisdictional barriers to this Petition, finding concessions where none were made and making procedural assertions without citation to or foundation in the record. For example, Respondents contest Petitioners' observation that the holding of the New Jersey Supreme was "uninvited by the briefs submitted by the defendant," but they provide no support or citation for their assertion that they invited the holding of that court. (Rb1). In fact, Respondents never argued in any manner to any court that the actual malice standard applies if by examining "the article in its entirety assuming that all its allegations are true," ... "drawing all reasonable and normal inferences," the article "describes conduct, activities, and events that would lead an average reader to conclude" that the business engaged in bad faith business practices. This holding was truly uninvited by the briefs

and arguments of the Respondent, as Petitioners fairly and correctly observed in their Petition.[1]

As for the other allegations contained in Respondents' Counterstatement of the Case (Rb2-3), Petitioners shall reply to each of these propositions, on the merits, in the course of replying to Respondents' statement of their Reasons for Denying the Writ. Petitioners have not misrepresented the holding of the New Jersey Supreme Court -- which is quoted above and speaks for itself -- or asserted "half truths" not supported by the record. (Rb2-3). Petitioners will refrain from such unfounded discourtesy and engage in a discussion on the merits of the Petition.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

I

THIS COURT POSSESSES JURISDICTION OVER THIS PETITION

It is ironic that Respondents, who so vigorously pressed their First Amendment rights in the three courts below, now argue to the contrary that there is no federal question invoked by this Petition.

Respondents begin their opposition brief by charging, incorrectly, that Petitioners' Statement of the Case does not comply with the mandate of Supreme Court Rule 14.1(h). A more careful reading of Petitioners' Statement of the Case reveals that it does, in fact, comply fully with the Rule.

Petitioners refer the Court to pages six and seven of the Petition where they specifically advised that since the trial court they have argued that the constitutional principles announced

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[1] Respondents' claim that Petitioners' counsel should have claimed "surprise" in response to a question from an Associate Justice of the New Jersey Supreme Court concerning the Consumer Fraud Act, rather than address the question, is at the same time fatuous and revealing. (Rb2). Even then, the court never suggested its ultimate holding, previously stated in this brief, by which the media defendants were permitted to create their own defense.

by this Court set the standards by which New Jersey measures the actual malice inquiry. As noted in the Petition, Petitioners specifically framed this issue on their Petition for Certification to the New Jersey Supreme Court.

Petitioners further refer this Court to pages four and five of the Petition, where, citing *Gertz v. Welch*, 418 U.S. 323 (1974), they advised the Court that they have consistently argued throughout that "it was the nature of the activity that must trigger any public interest privilege." (P.4). Although Respondents assert that the equal protection arguments advanced by the Petitioners are afterthoughts (Rb6), Respondents overlook that it is the New Jersey Supreme Court's uninvited holding itself -- presuming that all of the Respondents' allegations are true for purposes of determining whether the actual malice defense has been established -- that permitted Respondents to rely on a defense created by their own conduct and allegations. It is this uninvited holding that arbitrarily and capriciously permitted Respondents to create their own defense. Petitioners respectfully request this Court to consider the constitutional dimensions of the uninvited holding which was never argued by Respondents at any time during these proceedings and finds no support in the prior precedent of either this Court or the New Jersey Supreme Court.

II

THE NEW JERSEY SUPREME COURT SPECIFICALLY INVOKED THIS COURT'S FIRST AMENDMENT DECISIONS

A. This Court has recognized the individual's right to reputation

Respondents argue that there is no "constitutionally protected right in ... good name and reputation" or equal protection of that right under the constitution. (Rb6-7).

Respondents miss the import of Petitioners' argument. As stated, this Court has recognized that an individual's right to reputation was "basic" to our constitutional system. *Gertz*, 418 U.S. at 341 (*quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, *J.*, concurring). Although *Gertz* ruled that the degree

of protection that will be afforded that right is a matter of state defamation law, a state cannot create or enforce its defamation laws arbitrarily or capriciously in a manner that offends the constitutional precept of equal protection. Accordingly, states may possess "substantial latitude ... to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," *Gertz*, 418 U.S. at 345-46 (*see*Rb7), but it is illogical to presume, as Respondents do, that this latitude is beyond the scrutiny of the equal protection mandate of the United States Constitution. As Petitioners stated in their Petition, "once a state establishes such a standard, it must apply that standard and remedy equally to all individuals . . . ." (P.9).

B. The New Jersey Supreme Court specifically relied upon precedent of this Court in purporting to resolve the actual malice inquiry

Respondents argue next that the New Jersey Supreme Court "applied an actual malice standard in this case as a matter of state common law, not federal constitutional law." (Rb7-13). In support of this contention, Respondents point to nothing in the decision below. That the New Jersey Supreme Court relied on federal constitutional law as established by this Court is beyond dispute. Justice Stewart Pollock regretted that the Court did not resolve the case "*without resort to constitutional principles*." (49a) (emphasis supplied). Further, the New Jersey Supreme Court observed that its function in this matter called upon it to balance the "often-conflicting goals of the First Amendment" -- a person's right to reputation against the right of First Amendment expression. (43-44a). It specifically cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) as the governing case. (41a).

Respondents argue, without citation, that the New Jersey Supreme Court merely employed constitutional principles by analogy, a statement found nowhere in the Court's opinion. This Court wrote in *Michigan v. Long*, 463 U.S. 1032 (1983):

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not

> clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

463 U.S. at 1041.

Unable to point to any language in the New Jersey Supreme Court's decision that would dislodge this Court's jurisdiction, Respondents resort to citations to other cases where the New Jersey Supreme Court discussed the creation of a state common law privilege for "public interest" speech. Even these decisions, however, highlight only that the New Jersey Supreme Court has extended First Amendment protection of the actual malice standard to certain "public interest" expression. Accordingly, while the New Jersey Supreme Court determined the issue of whether a qualified public interest privilege attaches to speech by reference to state common law, it herein resolved the issue of whether the privilege has been overcome, due to the speaker's knowledge of falsity or reckless disregard, according to First Amendment principles.

C. The New Jersey Supreme Court's arbitrary and capricious application of the actual malice standard violates the equal protection clause

Petitioners have previously stated the holding of the New Jersey Supreme Court and demonstrated how, by applying the actual malice standard on the assumption that Respondents' unfounded allegations are true, the decision grants to the media, arbitrarily and capriciously, the right to create their own defense to a defamation action, in violation of *Hutchinson* and *Wolston*. Ignoring these decisions, Respondents argue that the Court's application of the actual malice standard simply

because of what Respondents said about Petitioners "raises no federal question." (Rb13).

Respondents highlight that the New Jersey Supreme Court claimed that it focused on "Turf's actions." (Rb14). Regardless of this assertion by the court, it is beyond dispute that the court applied the federal actual malice standard not because of anything Turf did -- *Turf in fact did nothing that violated the New Jersey Consumer Fraud Act* -- but because Respondents, after a so-called investigation marred by, at best, their gross negligence, *merely accused* Petitioners of conduct violative of the New Jersey Consumer Act. In the reasoning of the court below, it was obligated to presume that Respondents' allegations were true. The court thereafter determined that two of these allegations, if true, would establish conduct violative of the New Jersey Consumer Fraud Act. After assuming the truth of these two allegations, the court extended First Amendment protection of the actual malice standard to the *entire* article. Irrespective of the court's assertion that it focused on Turf's activity, Petitioners lost the right to prove before a jury the falsity of Respondents' expression simply because the court presumed Respondents' accusations to be true. The court thus focused on what Respondents *said* that Turf did in determining whether a privilege applied. As such, the court's focus was on the speakers and the content of their speech and not, as it claimed, on Turf's activities.

III

PETITIONERS HAVE NEVER CONCEDED THAT MR. GLORIA WAS THE "ALTER EGO" OF TURF AND HAVE ALWAYS MAINTAINED A DISTINCTION BETWEEN THEM

Seeking to erect another procedural barrier, without opposing the merits of the argument that the decision below violates Mr. Gloria's right to equal protection, Respondents attribute to Petitioners the concession, at some undefined point of these proceedings, that Mr. Gloria is the "alter ego" of Turf, and allege that Petitioners have treated themselves interchangeably throughout. In support of this advocacy, Respondents grasp the slim reeds that Petitioners in the complaint described Mr.

Gloria as president and sole shareholder of Turf, and that in their Appellate Division brief, Petitioners wrote that Mr. Gloria "operated" Turf. Petitioners never conceded that Mr. Gloria was the "alter ego" of Turf and did not treat themselves interchangeably throughout.

Respondents further write that "the only allegedly defamatory statements identified in the Amended Complaint ... related to the activities of Turf." (Rb17). Nonetheless, Respondents' own appendix demonstrates that among other things, Petitioners' complaint highlighted statements that were plainly defamatory of Mr. Gloria's character -- that he "made bogus tune-ups standard procedure," that he "lied to customers," and that he got "vindictive if a customer got impatient." (R3a).

Mr. Gloria's rights as a litigant, apart from those of Turf, were specifically argued to the New Jersey Supreme Court, but its decision affirmed without explanation the grant of summary judgment against Mr. Gloria. The court did not decide if Mr. Gloria had been personally defamed or what standard should apply to Mr. Gloria's personal defamation claim.

Ruling separately as to Mr. Gloria, the Appellate Division determined that Mr. Gloria had not been personally defamed because the article did not infringe on his "zone of privacy." (57a). Petitioners pressed their argument regarding Mr. Gloria's private reputation rights, apart from the rights being asserted by Turf, in a direct challenge to this observation of the Appellate Division in their filings before the New Jersey Supreme Court:

> In reality, the article is not a consumer report. It is a personal attack on a private person whose private interests were intentionally bootstrapped to an alleged consumer report. The article makes reference to the car Gloria drove, the value and location of his house, and his family life, for example. None of this information is in the public interest, *and the Appellate Division erred in holding that it was.*

(Reply Brief in Support of Petition for Certification, February 28, 1994, pp. 4-5, n.2) (emphasis supplied). In this light, it is inexplicable that Respondents charge that Petitioners did not

seek to vindicate Mr. Gloria's personal rights, apart from those of Turf.[2]

IV

THE NEW JERSEY SUPREME CITED AND PURPORTED TO RELY ON THIS COURT'S DECISIONS DEFINING ACTUAL MALICE

Petitioners have previously shown that the New Jersey Supreme Court majority specifically relied on First Amendment principles -- one judge criticizing its reliance -- in resolving the actual malice inquiry. *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983). In response to Petitioners' arguments that their proofs satisfy the actual malice standard, Respondents offer nothing more than their previously refuted claim that this Court's jurisdiction is lacking.

Respondents' contention that granting certiorari in this case would "federalize[] all common law privileges cases in states that adhere to the *Restatement [(Second) of Torts, Section 600]*" (Rb21) lacks merit. The jurisdiction of this Court can only be invoked in those matters, such as this one, where the court below invokes the First Amendment and its actual malice standard in resolving the issue of whether the claimant has overcome the qualified state law privilege. More correctly, if a state court invokes a state law fault standard to ascertain whether a claimant's proofs are sufficient to overcome a state law privilege, then federal jurisdiction would be lacking. The New Jersey Supreme Court, as noted by Justice Pollock, elected to resolve the actual malice inquiry by reference to constitutional principles, a fact which unquestionably confers jurisdiction over this matter in this Court.

Respondents make no effort to challenge the quality and quantity of Petitioners' proofs establishing Respondents' actual

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[2] It is also beyond comprehension why Respondents write that Petitioners made "no argument to the contrary" in response to the Appellate Division's observation that all comments of which Mr. Gloria complained "related to Gloria in his status as owner of Turf." (Rb18-19). Petitioners plainly argued that the "Appellate Division erred" in so holding. (Reply Brief in Support of Petition for Certification, pp. 4-5, n.2).

malice. No court in this matter has made any effort to explain why, for example, Respondents' alteration of material quotations, their publication of knowing falsehoods, and their omission and distortion of material fact to imply knowing falsities is insufficient to demonstrate Respondents' actual malice.

Petitioners are mindful of the scarce resources of this Court, but they urge this Court to undertake the inquiry overlooked or taken for granted by the courts below. Since neither Mr. Gloria nor Turf are public figures capable of challenging the accusations of this large media defendant in the arena of public opinion, their only hope to vindicate their good names is through the judicial system. It is fundamentally unfair that a large media corporate defendant could utterly destroy the reputations of a small business and its owner with an article that results from its "gross negligence," and then hide behind the actual malice standard. If this small business and private person are to be held to the actual malice standard in the only forum in which they can vindicate their rights, then they should at least be given a fair hearing as to whether their proofs are sufficient.

CONCLUSION

Respondents offer no meaningful or substantive opposition to the Petition for Certiorari. They seek to erect procedural barriers and jurisdictional obstacles to the Petition, which are predicated on representations of the record that are demonstrably incorrect. Based on the foregoing, Petitioners respectfully submit that the Petition for Certiorari should be granted.

Respectfully submitted,

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